MARZAIDI MOHAMMAD & ANOR v. MOHAMED AFFENDI KHAIRUDDIN & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
MARIANA YAHYA JCA
AZHAHARI KAMAL RAMLI JCA
FAIZAH JAMALUDIN JCA
[CIVIL APPEAL NOS: W-02(NCvC)(W)-1092-07-2023
& W-02(NCvC)(W)-1122-07-2023]
27 MAY 2025

Abstract – *(i) There is no provision in the Civil Law Act 1956 which states a beneficiary/next-of-kin of a deceased person may assume that the other beneficiaries, ie, parent, child or persons with disabilities under the care of the deceased person have waived their rights under the said Act by their failure to reply to the enquiry as to whether they are bringing or intending to bring an action against the party whose wrongful act caused the death of the deceased person. The legal heirs have not abandoned, transferred, assigned or otherwise disposed of their right to the estate or entitlement to claim for the death of the deceased to any person or entity. They are entitled to claim for the death of the deceased; (ii) Civil courts have the jurisdiction to declare the division of a goodwill payment in accordance with a faraid order where the parties sought for the High Court to distribute monies among the deceased's legal heirs in accordance with the distribution portion in the faraid order; (iii) Courts and judges may only allow preliminary objections for non-compliance of the rules if the non-compliance has occasioned a substantial miscarriage of justice that cannot be cured by amendment or order for costs or both. When there is a failure to prove that a non-compliance has caused any prejudice, the non-compliance of the writ with the Rules of Court 2012 does not render the amended writ and statement of claim a nullity.*

SUCCESSION: *Dependency claim – Parties – Next-of-kin – Distribution of goodwill payment to rightful legal heirs, beneficiaries and dependents of deceased – Whether claimants as child and father of deceased relinquished rights to bring action against airline company – Whether claimants abandoned, transferred or otherwise disposed of right to claim for death of deceased – Whether civil courts have jurisdiction to declare division of goodwill payment in accordance with faraid order – Civil Law Act 1956, s. 7(2)*

CIVIL PROCEDURE: *Writ – Statement of claim – Writ and statement of claim amended to substitute son as father's litigation representative – Failure to comply with mandatory requirement – Whether non-compliance occasioned substantial miscarriage of justice or prejudice – Whether rendered amended writ and statement of claim nullity – Whether there was failure to obtain letter of administration to estate of deceased – Whether there was lack of capacity to bring suit – Rules of Court 2012, O. 2 r. 3, O. 6 r. 1 & O. 15 r. 7*

The deceased was one of the crew members of the ill-fated flight MH17, operated by Malaysia Airlines System Bhd ('Malaysia Airlines'), which crashed in Ukraine on 17 July 2014. All the passengers and crew on board the flight perished in the crash. At the time of her death, the deceased left the following legal heirs: (i) the defendant, her husband; (ii) her only child who was ten years old ('child') from her marriage to her ex-husband ('first plaintiff'); and (iii) her father ('Mustafa') who was 82 years old. The deceased was the defendant's second wife and they had gotten married one year prior to her death. Following the deceased's death, the defendant filed for and obtained a faraid order from the Negeri Sembilan Syariah High Court for the division of the deceased's property among her legal heirs. The first plaintiff was appointed as the guardian to the child's assets pursuant to an order of the Negeri Sembilan Syariah High Court. The defendant's solicitors, Messrs Brijnandan Singh Bhar & Co ('Messrs Brijnandan'), in a letter addressed to Mustafa, enquired whether the deceased's family members intend to bring legal action against Malaysia Airlines for her death. Mustafa replied that the deceased's family did not want to be involved in the defendant's civil suit against Malaysia Airlines. The defendant then filed a civil action under the Montreal Convention 1999 ('Montreal Convention') and the Civil Law Act 1956 ('CLA') against Malaysia Airlines Bhd for causing the death or wrongful death of the deceased ('Suit 435') at the High Court. Section 7(2) of the CLA (as at the date of filing of Suit 435, *ie*, prior to the amendment by the Civil Law (Amendment) Act 2019, which came into force on 1 September 2019) states that an action for the wrongful death of a person shall be brought by and in the name of the executor of a person deceased, which action shall be for the benefit of the wife, husband, parent, child and any person with disabilities under the care of the deceased person. Nonetheless, contrary to s. 7(2) of the CLA, the defendant brought Suit 435 in his own name and in his personal capacity instead of in the name of the executor of the deceased's estate and in his capacity as the executor of the deceased's estate. The defendant was neither the executor nor the administrator of the deceased's estate when he filed Suit 435. The defendant contended that he was the only one entitled to the settlement amount paid by Malaysia Airlines to the deceased's legal heirs because he was the only claimant in Suit 435. The first plaintiff affirmed that he (as the guardian/next friend of the child), Mustafa and the defendant had met with Malaysia Airlines to discuss the issue of compensation for the death of the deceased payable to her next-of-kin comprising of the child, Mustafa and the

defendant. The defendant, however, denied that he had met with the said parties. The first plaintiff averred that he and the deceased's father agreed to accept the compensation proposed by Malaysia Airlines with the agreement that no legal proceedings will be filed against Malaysia Airlines. The first plaintiff and the deceased's father filed an application to intervene in Suit 435, which was dismissed. Mediation in Suit 435 between the defendant, Malaysia Airlines, the first plaintiff and Mustafa was conducted and subsequently, the Ipoh High Court, through an *ex parte* order, granted leave for the child (through the first plaintiff) to, *inter alia*, enter into a settlement with the parties in Suit 435, in order to protect the rights and interests of the child. The first plaintiff, Mustafa, the defendant and Messrs Brijnandan entered into a stakeholder agreement ('stakeholder agreement') where the parties agreed that a goodwill payment of RM800,000 shall be released by Malaysia Airlines into the client account of Messrs Brijnandan. The parties further agreed that the sum of RM200,000 shall be released and remitted to the defendant forthwith and that the balance sum of RM600,000 shall be held by Messrs Brijnandan as stakeholders, pending the filing of proceedings at the Kuala Lumpur High Court by the plaintiffs against the defendant. On 17 June 2019, Malaysia Airlines entered into a release agreement with the defendant, the first plaintiff and Mustafa ('releasors'). Under the release agreement, the releasors acknowledged receipt of the sum of RM800,000 ('goodwill payment') which sum was made up of (i) a goodwill discretionary payment of the sum of RM634,444 from Khazanah Nasional Bhd ('Khazanah') – the shareholder of Malaysia Airlines; and (ii) crew assistance package comprising of part or full entitlement of the deceased under the applicable collective agreement and a goodwill payment from Malaysia Airlines in the sum of RM165,556. The releasors warranted that they were the deceased's next-of-kin entitled to claim for the death of the deceased and that they 'shall distribute the payment to the rightful legal heirs, beneficiaries and/or dependents of the deceased who were entitled to claim for the death of the deceased.' Pursuant to the stakeholder agreement, the plaintiffs filed a civil suit ('Suit 629') against the defendant at the Kuala Lumpur High Court for the determination of the distribution of the balance of the goodwill payment in the sum of RM600,000 between the plaintiffs and the defendant. The plaintiffs pleaded that (i) the child was entitled to 7/12 of the balance of the goodwill payment in the sum of RM600,000; (ii) Mustafa was entitled to 2/12 of the RM600,000; and (iii) the defendant was entitled to 3/12 of the RM600,000. The plaintiffs sought for, *inter alia,* a declaration that the goodwill payment of RM600,000 paid by Malaysia Airlines through Suit 435 be divided in accordance with the faraid order. On 20 August 2020, Mustafa died and subsequently, the Kuala Lumpur High Court granted the plaintiffs' *ex parte* application for Thaib Mustafa ('Thaib'), the deceased's elder brother and Mustafa's son, to replace and be named a litigation representative of Mustafa under O. 15 r .7 of the Rules of Court 2012 ('ROC'). The writ and statement of claim was then amended to substitute Thaib as Mustafa's litigation representative as the second plaintiff ('amended

writ and statement of claim'). The defendant filed a counterclaim against the plaintiff in Suit 629 for his share of the deceased's estate in accordance with the faraid order. The defendant also raised procedural issues against the amended writ and statement of claim, claiming that it was a nullity. The High Court dismissed the defendant's procedural issues. The High Court, in also dismissing the plaintiffs' claim, held that, *inter alia*, since the plaintiffs had refused to join the defendant in his action in Suit 435 against Malaysia Airlines, the plaintiffs were estopped from bringing Suit 629 against the defendant for distribution of the goodwill payment in settlement of the defendant's action against it in Suit 435. The plaintiffs filed Appeal 1092 against the whole of the decision in Suit 629. The issues that arose in Appeal 1092 were: (i) whether the plaintiffs relinquished their rights to bring an action against Malaysia Airlines; (ii) whether the plaintiffs relinquished their rights to the goodwill payment made by Malaysia Airlines and Khazanah to the releasors in the release agreement and whether they were estopped from bringing Suit 629 against the defendant; and (iii) whether the civil courts have the jurisdiction to declare the division of the goodwill payment made by Malaysia Airlines and Khazanah among the releasors in accordance with the distribution portion in the faraid order. The defendant filed Appeal 1122 against the dismissal of the procedural issues raised by him in Suit 629. The issues that arose in Appeal 1122 were: (i) whether the amended writ was a nullity as the plaintiff failed to comply with mandatory requirement for the writ to be issued in the name of the Yang di-Pertuan Agong; (ii) whether the amended writ and statement of claim was a nullity because they could not be assisted by the saving provisions in O. 1A of the ROC; (iii) whether the citation of the tutelage on the amended writ and statement of claim was bad in law as both the first and second plaintiffs lacked the capacity to bring this suit as the first and second plaintiffs failed to obtain the letter of administration to the estate of the deceased; and (iv) whether the second plaintiff, Thaib, could proceed with the suit without obtaining letters of administration to administer the estate of Mustafa who brought an action against the defendant when he was alive; and (v) whether it was mandatory to comply with O. 76 r. 2 and O. 76 r. 3(7) of the ROC whereby the first plaintiff needed to file the Forms 188 and 189 to state whether there was no adverse interest against the child.

Held (allowing Appeal 1092; dismissing Appeal 1122)

Per Faizah Jamaludin JCA delivering the judgment of the court:

(1a) There is no provision in the CLA which states that the husband of a deceased person may assume that the parent, child or persons with disabilities under the care of the deceased person have waived their rights under the said Act by their failure to reply to a letter written by the husband's solicitors enquiring whether they are bringing or intending to bring an action against the person whose wrongful act

caused the death of the deceased person. If Parliament wanted to allow one of deceased's beneficiary/next-of-kin to assume the other beneficiaries/next-of-kin's waiver of their statutory rights by their actions and/or omission, it would have expressly provided so in the CLA. Moreover, Mustafa's previous solicitor did not state that the deceased's father and child were waiving their rights to maintain an action and recover damages from Malaysia Airlines. All the solicitor stated in the reply letter was that the deceased's family did not want to be involved in any action taken by the defendant. (paras 65 & 66)

(1b) Any action under s. 7(2) of the CLA must be brought by and in the name of the executor of the person deceased for the benefit of the spouse, parent, child or persons with disabilities under the care of the deceased person. The defendant was neither the executor nor the administrator of the deceased's estate when he filed Suit 435. He brought the action in his personal capacity for his own benefit and not as the executor of the deceased's estate for the benefit of the deceased's spouse, child or parent. The Judicial Commissioner ('JC') was plainly wrong to find that the plaintiffs had relinquished their rights to bring an action against Malaysia Airlines by reason of the reply letter from Mustafa's previous solicitors to the defendant's solicitors. (paras 67 & 68)

(2a) The plaintiffs had not relinquished their rights to the goodwill payment made by Khazanah and Malaysia Airlines to the releasors in the release agreement for the deceased's death. The fact that the plaintiffs had filed Suit 629 against the defendant within three months from the date of the release agreement, meant that the plaintiffs did not relinquish their rights to the goodwill payment. The releasors had expressly acknowledged in the release agreement that they had received the goodwill payment from Khazanah and Malaysia Airlines in full and final settlement of their claim as a result of the deceased's death. The releasors had warranted under the release agreement that they have not, *inter alia*, abandoned, transferred or otherwise disposed of their right to claim for the death of the deceased. Hence, it was not open for the defendant to argue that the first plaintiff who was acting as the guardian *ad litem*/litigation representative of the child and the second plaintiff who was acting as the litigation representative of Mustafa, had relinquished their rights to claim for the death of the deceased. (paras 77-80)

(2b) Having contractually warranted under the release agreement that he, Mustafa and the first plaintiff (acting as the guardian/litigation representative of the child) were entitled to claim for the goodwill payment, it was not open for the defendant to claim that the plaintiffs were not entitled to claim part of the goodwill payment paid by

Khazanah and Malaysia Airlines for the death of the deceased. Furthermore, the defendant, as one of the releasors, had warranted under the release agreement that he would distribute the goodwill payment to the rightful legal heirs, beneficiaries and/or dependents of the deceased who are entitled to claim for the death of the deceased. Therefore, if the defendant failed and/or refused to distribute Mustafa's and the child's share of the goodwill payment to them, the defendant would be in breach of the release agreement. For these reasons, the plaintiffs were not estopped from bringing Suit 629 against the defendant. (paras 81-83)

(3) The plaintiffs in Suit 629 were merely seeking for the High Court to distribute monies among the deceased's legal heirs in accordance with the distribution portion in the faraid order that was granted by the Negeri Sembilan Syariah High Court pursuant to s. 65 of the Enakmen Pentadbiran Agama Islam (Negeri Sembilan) 2003. They were not seeking for the determination of the distribution portion of the goodwill payment among the deceased's legal heirs. Nor were they seeking the issuance of a faraid order. Accordingly, the civil courts do have the jurisdiction to declare the division of the goodwill payment made by Malaysia Airlines and Khazanah among the releasors in accordance with the faraid order dated 25 February 2015 issued by the Negeri Sembilan Syariah High Court. Thus, the High Court's decision in Suit 629 should be set aside and the reliefs sought by the plaintiffs be allowed. (paras 90-93)

(4) Under O. 2 r. 3 of the ROC, courts and judges may only allow preliminary objections for non-compliance of the Rules if the court or the judge is of the view that the non-compliance has occasioned a substantial miscarriage of justice or prejudice that cannot be cured by amendment or order for costs or both. The defendant did not claim that the plaintiffs' failure to issue the amended writ in the name of the Yang di-Pertuan Agong had caused him a substantial miscarriage of justice or prejudice that cannot be cured by amendment or an appropriate order for costs. The plaintiffs' non-compliance with O. 6 r. 1 of the ROC as regards the format of a writ had not occasioned a substantial miscarriage of justice or prejudice to the defendant in Suit 629 that could not be cured either by amendment or an appropriate order for costs or both. The non-compliance of the writ with the Rules did not render the amended writ and statement of claim a nullity. (paras 102-104)

(5) With regards to the defendant's challenge based on the plaintiffs' lack of letters of administration of the deceased's estate, the stakeholder agreement had expressly granted the first plaintiff and the original second plaintiff (Mustafa) the right to initiate Suit 629 for the determination of the parties' rights to the RM600,000 held by Messrs Brijnandan in the stakeholder accounts. As the defendant had contractually agreed under the stakeholder agreement for the plaintiffs to bring Suit 629 against him, such agreement negated the defendant's argument that the plaintiffs could not bring the said suit without first obtaining letters of administration of the deceased's estate. Furthermore, the plaintiffs had brought Suit 629 against the defendant pursuant to the terms of the stakeholder agreement and the release agreement. (paras 106-107)

(6) As for the procedural issue relating to Thaib's right to act as the second plaintiff representing the estate of Mustafa without first obtaining letters of administration to administer Mustafa's estate, Thaib had the right to act as litigation representative of Mustafa's estate in Suit 629 by reason of the High Court order dated 24 November 2020 pursuant to O. 15 r. 7 of the ROC granting Thaib the right to continue with Suit 629 as if he had been substituted for Mustafa in the said Suit 629, which remained in force. (para 108)

(7) On the issue of whether it was mandatory for the first plaintiff to file Forms 188 and 189 under O. 76 r. 2 and O. 76 r. 3(7) of the ROC, the filing of the said forms was only necessary if the first plaintiff had not been appointed by the court as the child's litigation representative. In this case, the first plaintiff was granted leave by the Ipoh High Court to act as the child's litigation representative pursuant to an order dated 15 May 2019. There was thus no error in the JC's analysis and reasonings for dismissing the procedural issues raised by the defendant. (paras 110-112)

Case(s) referred to:

Latifah Mat Zin v. Rosmawati Sharibun & Anor [2007] 5 CLJ 253 FC ***(refd)***

Petra Perdana Bhd v. Tengku Dato' Ibrahim Petra Tengku Indra Petra & Ors [2017] CLJU 422; [2017] 1 LNS 422 HC ***(refd)***

Sng Hung Meng v. Public Utilities Board [1966] CLJU 182; [1966] 1 LNS 182 FC ***(refd)***

Legislation referred to:

Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003, s. 65

Civil Law Act 1956, ss. 2, 7(1), (2), (5), 8

Rules of Court 2012, O. 1A, O. 2 r. 3, O. 6 r. 1, O. 15 r. 7, O. 18 r. 19(1)(a), (b), (d), O. 37 r. 1, O. 59 r. 19, O. 76 rr. 2, 3(7)

Specific Relief Act 1950, s. 41

(Civil Appeal No: W-02(NCvC)(W)-1092-07-2023)
For the appellants - Norazali Nordin, Fey Aqis Mohd Khairuddin & Lailatul Fitriah Ma'at; M/s Raimy Fuaad Aqis
For the respondent - GK Ganesan, Brijnandran Singh Bhar, Natasha Bhar, Jasween Kaur Dhaliwal & Pavaani Tanggaveloo; M/s Brijnandan Singh Bhar & Co

(Civil Appeal No: W-02(NCvC)(W)-1122-07-2023)
For the appellant - GK Ganesan, Brijnandran Singh Bhar, Natasha Bhar, Jasween Kaur Dhaliwal & Pavaani Tanggaveloo; M/s Brijnandan Singh Bhar & Co
For the respondents - Norazali Nordin, Fey Aqis Mohd Khairuddin & Lailatul Fitriah Ma'at; M/s Raimy Fuaad Aqis

[Editor's note: For the High Court judgment, please see Marzaidi Mohammad & Anor v. Mohamed Affendi Khairuddin [2023] 10 CLJ 305 (overruled in part).]

Reported by Suhainah Wahiduddin

JUDGMENT

Faizah Jamaludin JCA:

Introduction

[1] The late Mastura binti Mustafa (the "deceased") was one of the crew members of the ill-fated flight MH17, operated by Malaysia Airlines System Berhad ("Malaysia Airlines"), which crashed near Hrabove in Donetsk Oblast, Ukraine on 17 July 2014.

[2] Flight MH17 was a scheduled passenger flight from Amsterdam Schipol International Airport, Netherlands to Kuala Lumpur International Airport. The aircraft was shot down by a surface to air missile when it was flying over Eastern Ukraine. All the passengers and crew on board the flight perished in the crash.

[3] At the time of her death, the deceased left the following legal heirs:

(i) Mohamed Affendi bin Khairuddin ("the defendant") – her husband;

(ii) Muhammad Muhriz bin Marzaidi ("the child") – her only child from her marriage to her ex-husband, Marzaidi bin Mohammad ("the first plaintiff"); and

(iii) Mustafa bin Ab Samad ("Mustafa") – her father.

[4] The deceased was the defendant's second wife. They were married in Songkhla, Thailand on 25 June 2013, approximately one year prior to her death. Their marriage was registered on 10 March 2014 under the Akta Undang-Undang Keluarga Islam Wilayah-Wilayah Persekutuan 1984 pursuant to an order of the Syariah High Court of Wilayah-Wilayah Persekutuan.

[5] At the time of the deceased's death, the child was ten years old, and Mustafa was 82 years old.

Faraid Order

[6] Following the deceased's death, the defendant filed for and obtained a faraid order (perintah faraid) on 5 February 2015 from the Negeri Sembilan Syariah High Court for the division of the deceased's property among her legal heirs. Under the faraid order, the Negeri Sembilan Syariah High Court ordered that the deceased's estate be distributed among her legal heirs in the following proportions:

Name	Division
Defendant	3/12
Mustafa	2/12
Child	7/12

[7] On 9 February 2015, the first plaintiff was appointed as the guardian to the child's assets (penjaga kepada harta-harta yang dimiliki oleh anak yang bernama Muhammad Muhriz bin Marzaidi) pursuant to an order of the Negeri Sembilan Syariah High Court.

[8] The defendant's solicitors, Messrs Brijnandan Singh Bhar & Co ("Messrs Brijnandan"), in a letter dated 28 July 2015 addressed to Mustafa, enquired whether the deceased's family members intend to bring legal action against Malaysia Airlines for her death. Mustafa's former solicitors, Messrs Mohd Khairul Masni & Associates, through a letter dated 17 August 2015 replied, *inter alia*, that the deceased's family did not want to be involved in the defendant's civil suit against Malaysia Airlines.

Suit 435

[9] The defendant then filed a civil action on 15 July 2016 under the Montreal Convention 1999 ("Montreal Convention") and the Civil Law Act 1956 (Act 1967) ("CLA 1956") against Malaysia Airlines System Berhad (administrator appointed) and Malaysia Airlines Berhad for causing the death or wrongful death of the deceased in Civil Suit No. WA- 22CNCVC-435-07/ 2016 ("Suit 435") at the Kuala Lumpur High Court.

[10] Section 7(2) of the CLA 1956 (as at the date of filing of Suit 435, *ie*, prior to the amendment by the Civil Law (Amendment) Act 2019, which came into force on 1 September 2019) states that an action for the wrongful death of a person shall be brought by and in the name of the executor of a person deceased, which action shall be for the benefit of the wife, husband, parent, child and any person with disabilities under the care of the deceased person. Section 7(1) and (2) of the CLA 1956 reads:

A

7. Compensation to the family of a person for loss occasioned by his death

(1) Whenever the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an
B action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to an offence under the Penal Code [Act 574].

C (2) *Every such action shall be for the benefit of the wife, husband, parent, child, and, if any, of the person whose death has been so caused and shall be brought by and in the name of the executor of the person deceased.*

(emphasis added)

"Executor" is defined in s. 2 of the CLA 1956 as:

D the executor or administrator of a deceased person, and includes, as regards any obligation, any person who takes possession of or intermeddles with the property of a deceased person

[11] Nonetheless, contrary to s. 7(2) of the CLA 1956, the defendant brought Suit 435 in his own name and in his personal capacity instead of in
E the name of the executor of the deceased's estate and in his capacity as the executor of the deceased's estate. The defendant was neither the executor nor the administrator of the deceased's estate when he filed Suit 435. He filed Suit 435 against Malaysia Airlines on 15 July 2016. The letter of administration appointing him as co-administrator of the deceased's estate
F was only issued on 8 April 2017.

[12] Additionally, in breach of s. 7(2) of the CLA 1956, the defendant did not bring Suit 435 for the benefit of the parent and child of the deceased. Instead, the defendant brought the action for his own benefit. The defendant did not plead in Suit 435 that the deceased had also left the child and her
G father, Mustafa, as her legal next-of-kin. Instead, the defendant pleaded in para. 1 of the statement of claim that he brought the action alone. Paragraph 1 reads:

[2] Plaintif adalah suami dan tanggungan Mastura Binti Mustafa (740628-05-5386) simati ("simati") dan **membawa tindakan ini secara bersendiri**
H dan mempunyai alamat di Lot 2994, Kampung Paya Jatas Tengah, 47000 Sungai Buloh, Selangor. Permohonan untuk pentadbiran harta pusaka simati telah dibuat di Mahkamah Tinggi Kuala Lumpur.

(emphasis added)

[13] The fact that the defendant filed the action in his own capacity to
I protect his own interest as the deceased's legal heir, is supported by the defendant's averment his affidavit in reply affirmed on 13 July 2018 (filed in objection to the first plaintiff and Mustafa's application to intervene in Suit 435), where he said:

> 9. Saya selanjutnya menyatakan ia adalah hak saya yang terjamin di bawah undang-undang untuk menfailkan saman terhadap Defendan-Defendan atas kematian isteri saya di atas MH17 pada 17.7.2014 dan saya telah mengarahkan peguamcara saya untuk memfailkan tuntutan tersebut di Mahkamah **untuk menjaga kepentingan saya sebagai waris kepada Allahyarhamah Mastura Binti Mustafa** agar tuntutan saya tidak dibatalkan oleh isu had masa. Kesemua hak saya di bawah undang-undang ini telah dinasihati oleh peguamcara saya sebelum saya memfailkan tuntutan saya di Mahkamah.
>
> 10 ... saya telah mengarahkan peguamcara saya untuk memfailkan tuntutan sivil terhadap Defendan-Defendan **agar kepentingan saya terjaga** dan tuntutan saya tidak dihalang oleh had masa.
>
> (emphasis added)

[14] The defendant contends that he is the only one entitled to the settlement amount paid by Malaysia Airlines to the deceased's legal heirs because he is the only claimant in Suit 435. In para. 12 of affidavit in reply, the defendant averred:

> 12. Saya juga dinasihati bahawa perintah Faraid adalah tidak bersangkutpaut dengan tuntutan sivil saya dan perintah Faraid tidak boleh digunapakai, diterima dan/atau dipertimbangkan oleh Mahkamah Sivil. Saya juga dinasihati oleh peguamcara saya bahawa *sebarang jumlah penyelesaian yang dipersetujui hanya boleh dibahagikan dikalangan pihak-pihak yang menuntut ("claimants") dan di dalam kes ini hanya saya yang telah memfailkan tuntutan terhadap Defendan-Defendan.*
>
> (emphasis added)

[15] The first plaintiff in his affidavit in support affirmed on 21 June 2018 stated that he (as the guardian/next friend of the child), Mustafa, and the defendant had met with Malaysia Airlines System Berhad (administrator appointed) and Malaysia Airlines Berhad (collectively referred to as "Malaysia Airlines") on 8 August 2014 and 7 July 2015 to discuss the issue of compensation for the death of the deceased payable to her next-of-kin comprising of the child, Mustafa and the defendant. The defendant in his affidavit in reply strenuously denied that he had met with Malaysia Airlines with the first plaintiff and Mustafa on 8 August 2014 and 7 July 2015.

[16] The first plaintiff averred that he and Mustafa agreed to accept the compensation proposed by Malaysia Airlines with the agreement that no legal proceedings will be filed against Malaysia Airlines. The first plaintiff averred that he found out around July 2017 that the defendant had filed Suit 435 against Malaysia Airlines.

[17] On 27 June 2018, the first plaintiff (as the guardian/next friend of the child) and Mustafa, as the legal heirs of the deceased, filed an application to intervene in Suit 435.

[18] The defendant strenuously objected to the first plaintiff and Mustafa's application to intervene in Suit 435. In his affidavit in reply the defendant averred that the first plaintiff and Mustafa are prohibited and estopped from making the application to intervene because the application was made at the eleventh hour after limitation had set in and after the defendant had agreed to accept the full and final settlement sum from Malaysia Airlines System Berhad (administrator appointed). He said that the application to intervene was an afterthought to annoy and embarrass him (menyakitkan hati dan memalukan saya). The defendant asked that for these reasons the High Court should dismiss the application with costs.

[19] The first plaintiff and Mustafa's application to intervene was dismissed by Mohd Firuz Jafril J (as he then was) in an order dated 14 September 2018. No grounds of judgment were issued by the court for the dismissal of the application.

[20] Mediation in Suit 435 between the defendant, Malaysia Airlines System Berhad (administrator appointed) and Malaysia Airlines Berhad, the first plaintiff (as the guardian/next friend/litigation representative of the child) and Mustafa was conducted by Azizul Azmi Adnan J (as he then was) on 22 April 2019 and 13 May 2019.

[21] On 15 May 2019, the Ipoh High Court in Originating Summons No. AA-24NCVC-188-05/2019 through an *ex parte* order granted leave for the child (through the first plaintiff):

(i) to enter into a settlement with the parties name in Suit 435, in order to protect rights and interests of the child;

(ii) to bring action in line with terms of the settlement in Suit 435 during the mediation held at the Kuala Lumpur High Court on 22 April 2019 in order to protect rights and interests of the child; and

(iii) to bring any legal proceedings to ensure the rights and interests of the child, including but not limited to the filing civil suits, defence, counterclaim and/or application to intervene in any legal proceedings that is taking place and/or to enter appearance in any action.

Stakeholder Agreement

[22] The first plaintiff as the guardian *ad litem*/legal representative of the child, Mustafa, the defendant and Messrs Brijnandan entered into a stakeholder agreement dated 28 May 2019 ("stakeholder agreement "). In the stakeholder agreement, the defendant was referred to as "the plaintiff", the first plaintiff and Mustafa were referred to as "the intervening – parties", and Messrs Brijnandan was referred to as "the solicitors".

[23] Under the stakeholder agreement, the parties agreed that a goodwill payment of RM800,000 shall be released by Malaysia Airlines into the client account of Messrs Brijnandan.

[24] Recital C of the stakeholder agreement states that Malaysia Airlines agreed to release the goodwill payment as full and final settlement of all claims by the defendant, the first plaintiff and Mustafa. Recital C reads:

> 3. MAS has agreed to release the sum of Ringgit Malaysia Eight Hundred Thousand (RM800,000.00) as a full and final settlement sum, subject to the signing of the Form of Release and Discharge for Settlement and Release of All Claims by the plaintiff and the Intervening – Parties.

[25] The parties further agreed that the sum of RM200,000 shall be released and remitted to the defendant forthwith and that the balance sum of RM600,000 shall be held by Messrs Brijnandan in a profit bearing Syariah-compliant fixed deposit account in Maybank Islamic Bank as stakeholders, pending the filing of proceedings at the Kuala Lumpur High Court by the plaintiffs against the defendant, within three months from the date of the release agreement to determine whether the plaintiffs are entitled to the said RM600,000.

[26] They agreed in para. 5(b) of the stakeholder agreement that if the plaintiffs fail to commence the proceedings against the defendant within the stipulated three months period, Messrs Brijnandan undertakes to release the balance sum of RM600,000 to the defendant. Paragraphs 4 and 5 of the stakeholder agreement reads:

> (4) The plaintiff and intervening-parties hereby agree that the intervening – parties shall commence proceedings, if any, in the High Court of Malaya at Kuala Lumpur for the determination of the RM600,000 held in the stakeholder's account and that such proceedings, if any shall be commenced with a period of three months from the date of the form of release and discharge for settlement and released of all claims by the plaintiff and the intervening-parties.
>
> (5) Both the plaintiff and the intervening-parties hereby agree that the said sum of RM600,000 together with all profits shall be released by the solicitors (Messrs Brijnandan) upon the occurrence of any of the following events:
>
> (a) the final determination is made in such proposed proceedings in the High Court of Malaya at Kuala Lumpur by (the) intervening parties against the plaintiff including any ensuing appeals in accordance with the order of the High Court or any order of the appellate courts as the case may be; or
>
> (b) in the event no such proposed proceedings, if any, are commenced by the intervening parties within a period of three months from the date of the form of release and discharge for settlement and release of all claims by the plaintiff and the intervening parties, the solicitors unconditionally undertake to release the sum of RM600,000 to the plaintiff forthwith.

Release Agreement

[27] On 17 June 2019, Malaysia Airline System Berhad (administrator appointed) (referred to as "Malaysia Airlines" in the release agreement) entered into a "form of release and discharge for settlement and release of all claims" (the "release agreement") with the (i) defendant; (ii) the first plaintiff as the guardian *ad litem*/legal representative of the child; and (iii) Mustafa (collectively referred to as "releasors" in the release agreement).

[28] Under the release agreement, the releasors acknowledged receipt of the sum of RM800,000 (the "goodwill payment"), which sum was made up of:

(i) a goodwill discretionary payment of the sum of RM634,444 from Khazanah Nasional Berhad ("Khazanah") – the shareholder of Malaysia Airlines; and

(ii) crew assistance package comprising of part or full entitlement of the deceased under the applicable collective agreement and a goodwill payment from Malaysia Airlines in the sum of RM165,556.

[29] The goodwill payment of RM800,000 was deposited into the client's account of Messrs Brijnandan as stakeholders for the releasors pursuant to a stakeholder agreement dated 28 May 2019 entered between the releasors and Messrs Brijnandan.

[30] The defendant, the first plaintiff and Mustafa in the releasors acknowledged that they have received the total sum of RM800,000 from Khazanah and Malaysian Airlines, which sum were deposited in the client account of Messrs Brijnandan as stakeholders, and that the sum was in full and final settlement of their claims as a result of the deceased's death. Paragraph 1 of the release agreement reads:

> We, ... The releasors in our capacity as the legal heirs and/or representatives and/or beneficiaries and/or dependants, as may be applicable, entitled to claim for the death of the deceased hereby DECLARE, ACKNOWLEDGE AND AGREE as follows:
>
> I. PAYMENT CONSIDERATION DETAILS AND PARTIES RELEASED
>
> 1. **We, the Releasors, acknowledge:**
>
> 1.1 the receipt of the sum of MYR634,444.00 (Ringgit Malaysia six Hundred Thirty Four Thousand Four Hundred Forty Four Only), **by way of goodwill discretionary payments from Khazanah Nasional Berhad**;
>
> 1.2 **the receipt of payments made by Malaysia Airlines** in respect of Crew Assistance Package which comprises part or full entitlement of the deceased under the applicable Collective Agreement and a goodwill payment from Malaysia Airline **totalling the sum of MYR165,556.00** (Ringgit Malaysia One Hundred Sixty Five Thousand Five Hundred Fifty Six Only),

(the payments in paragraphs 1.1 and 1.2 are collectively referred to as the "Payment"), which Payments [*sic*] were deposited into the client's account of Messrs. Brijnandan Singh Bhar & Co at Malayan Banking Berhad Account No. XXXXXXX31140, as stakeholders for the Releasors pursuant to the stakeholder agreement dated 28th May 2019.

3.3 the Payment is made in full and final settlement of all existing and potential claims, demands, sums of money, actions, rights, causes of action, obligations and liabilities, whether known or unknown, foreseen and unforeseen, anticipated or unanticipated, suspected or unsuspected, of every kind or nature whatsoever, inclusive of checked and hand baggage, personal effects and legal costs which the Releasors have, had or have claimed to have had, or now have or claim to have, or hereafter may have or have claimed to have had, or now have or claim to have, or hereafter may have or assert to have, which arise out of or are in any manner whatsoever, either directly or indirectly, connected or related to the alleged damages sustained by the Releasors as a result of the death to the alleged damaged sustained by the Releasors as a result of the death of the deceased, or as a result of the death of the deceased, or as a result of the Accident involving the Aircraft or both.

(emphasis added)

[31] Furthermore, the releasors warrant that they are the deceased's next-of-kin entitled to claim for the death of the deceased and that they "shall distribute the payment to the rightful legal heirs, beneficiaries and/or dependents of the deceased who are entitled to claim for the death of the deceased". Paragraph 6 of the release agreement reads:

6. Only Legal Heir

6. *The Releasors warrant that the Releasors are the deceased next-of-kin entitled to claim for the death of the deceased and shall distribute the Payment to the rightful legal heirs, beneficiaries and/or dependents of the deceased who are entitled to claim for the death of the deceased*; and that of the Releasors have not abandoned, transferred, made over, assigned or otherwise disposed of their rights to the estate or entitlement to claim for the death of the deceased to any person or entity.

(emphasis added)

[32] In exchange for the goodwill payment, the releasors agreed to transfer, assign and subrogate to Malaysia Airlines and their insurers and reinsurers, any and all of the releasors' claims for indemnity of any kind whatsoever arising from MH17 crash and the deceased's death. Paragraph 7 of the release agreement reads:

7. Transfer Of Assignment And Subrogation Of Rights

7. In exchange for the Payment paid to and received by the Releasors pursuant to this Release, the Releasors hereby transfer, assign and subrogate to Malaysia Airlines and their insurers and reinsurers or as

A directed by them, any and all the Releasors' claims for Indemnity of any kind whatsoever arising from the above Accident and the death of the deceased.

[33] It was expressly stated in para. 11.7 that the release agreement constitutes the entire agreement between the releasors and the releasees
B (defined in sub-para. 2.1.1(a) to (g) of the release agreement) relating to the subject matter of the release agreement, and that the release agreement supersedes all prior communications, understanding or agreements between the releasors and releasees.

Discontinuance Of Suit 435

C

[34] On 26 June 2019, the defendant filed a notice of discontinuance dated 25 June 2019 to discontinue Suit 435 with no order as to costs and no liberty to file afresh.

Suit 629

D

[35] Pursuant to the stakeholder agreement, the plaintiffs filed Civil Suit No. WA-22NCVC-629-08/2019 ("Suit 629") against the defendant at the Kuala Lumpur High Court on 28 August 2019, for the determination of the distribution of the balance of the goodwill payment in the sum of RM600,000 between the plaintiffs and the defendant.

E

[36] The plaintiffs pleaded in para. 22 of the statement of claim that:

(i) the child is entitled to 7/12 of the balance of the goodwill payment in the sum of RM600,000;

(ii) Mustafa is entitled to 2/12 of the RM600,000; and

F

(iii) the defendant is entitled to 3/12 of the RM600,000.

[37] The plaintiffs sought the following declaratory orders in Suit 629:

(i) a declaration that the child and Mustafa are the legal heirs to the deceased and both of them are entitled to the goodwill payment of
G RM600,000;

(ii) a declaration that the goodwill payment of RM600,000 paid by Malaysia Airlines through Suit 435 held by Messrs Brijnandan as stakeholders be divided in accordance with the faraid order together the
H profit obtained from the Islamic fixed deposit account no. XXXXXXXX6970 at Maybank Islamic Berhad; and

(iii) a declaration that the first plaintiff is the guardian to the child's portion of the goodwill payment after the division has been made in accordance with the faraid order.

I

[38] The plaintiffs further sought for an order that Messrs Brijnandan be directed to release to the plaintiffs their portions of the goodwill payment within 14 days of the order of the court.

[39] On 20 August 2020, approximately a year after filing Suit 629, Mustafa died. On 24 November 2020, the Kuala Lumpur High Court granted the plaintiffs' *ex parte* application for Thaib bin Mustafa ("Thaib") to replace and be named a litigation representative of Mustafa under O. 15 r. 7 of the Rules of Court 2012 ("ROC"). The writ and statement of claim was then amended to substitute the Thaib, as Mustafa's litigation representative, as the second plaintiff ("the amended writ and statement of claim"). Thaib is the deceased's elder brother and Mustafa's son.

[40] The defendant filed a counterclaim against the plaintiff in Suit 629 for his share of the deceased's estate in accordance with the faraid order.

[41] He also filed an application (encl. 9) to strike out the amended writ and statement of claim under O. 18 r. 19(1)(a), (b) and (d) of the ROC. The defendant's striking out application was dismissed by the High Court with costs on 21 June 2021. The defendant appealed against the dismissal of his application. His appeal was dismissed by the Court of Appeal on 30 August 2022. The Court of Appeal in their broad grounds of judgment stated:

> For appeal 1290 (R15), we are not convinced that it is a plain and obvious case for striking out as there is an issue to be tried with regard to the plaintiffs' entitlement as a matter of law to share the balance of the settlement sums.
>
> It is clear from the statement of claim that the plaintiffs are relying on the Sijil Faraid to establish their claims. Whether the plaintiffs are entitled to make such claim is a fit and proper issue to be determined at the trial.
>
> It also appears from the letter of release that all potential beneficiaries had given their release in favour of MAS. This may imply that they have certain rights in respect of the settlement monies. But at this stage, we express no views on this issue and shall be left to the trial judge to decide.
>
> Therefore, the suit should not be struck out summarily.

[42] Following the dismissal of the defendant's striking out application, Suit 629 proceeded to trial at the Kuala Lumpur High Court. At the trial, the defendant raised the following procedural issues against the amended writ and statement of claim:

(i) the amended writ is a nullity because the plaintiffs failed to comply with the requirement that the writ be issued in the name of the DYMM Yang di-Pertuan Agong;

(ii) the amended writ and statement of claim are a nullity because they cannot be assisted by the saving provisions in O. 1A of the Rules of Court 2012;

(iii) Thaib cannot proceed with Suit 629 because he had not obtained a letter of administration to administer Mustafa's estate; and

(iv) the first plaintiff failed to file Forms 188 and 189 under O. 76 r. 2 and O. 76 r. 3(7) of the ROC, stating that there is no adverse interest against the child who is a minor.

The High Court's Decision In Suit 629

[43] The learned Judicial Commissioner ("JC") dismissed the defendant's procedural issues and proceeded to decide Suit 629 on its merits.

[44] The learned JC held that the High Court has the necessary jurisdiction to determine the plaintiffs' entitlement under the faraid order since the plaintiffs were merely seeking a distribution of the goodwill payment in accordance with the distribution portion ordered under the faraid order. As the plaintiffs were not asking for the issuance of a faraid order by the High Court, the learned JC held that List II – State List of the Ninth Schedule of the Federal Constitution does not apply as regards the plaintiffs' claim in Suit 629.

[45] On the issue of whether the plaintiffs have a cause of action under ss. 7 and 8 of the CLA 1956, the learned JC held that since the plaintiffs had refused to join the defendant in his action in Suit 435 against Malaysia Airlines, after having being invited by the defendant's solicitors prior to the defendant filing Suit 435, the plaintiffs are estopped from bringing Suit 629 against the defendant for distribution of the goodwill payment in settlement of the defendant's action against it in Suit 435.

[46] Additionally, the learned JC held that as the plaintiffs did not plead a dependency claim in the re-amended statement of claim but instead are claiming for their entitlement under the faraid order, they failed to plead their dependency claim as the legal heirs of the deceased's estate. Further, the learned JC held that the plaintiffs cannot "enter the suit through the back door and reap the fruits" of the defendant's successful negotiations with Malaysia Airlines in Suit 435, and that the monies received by the defendant from Malaysia Airlines in settlement of Suit 435 does not form part of the deceased's estate.

[47] On the issue of whether Suit 629 is statute-barred, the learned JC held that limitation had accrued when the plaintiffs failed to bring a suit against Malaysia Airlines within the respective limitation periods under the Montreal Convention and s. 7(5) of the CLA 1956.

[48] Based on his findings on the merits, the learned JC, in his decision delivered on 26 June 2023, dismissed the plaintiffs' claim in Suit 629. He also dismissed the defendant's counterclaim after acknowledging the defendant's position that the defendant will no longer pursue his counterclaim if the plaintiffs' claim against him is dismissed.

[49] As regards costs, the learned JC said in para. 86 of his grounds of judgment that he did not want to impose a high award of costs "due to the nature of the claim and the tragedy that affected all parties who are related to the deceased, in particular the child".

These Appeals

[50] The plaintiffs filed Civil Appeal No: W-02(NCVC)(W)-1092-07/2023 ("Appeal 1092") and the defendant filed Civil Appeal No. W- 02(NCVC)(W)-1122-07/2023 ("Appeal 1122") against the High Court's decision in Suit 629.

Appeal 1092

The Plaintiffs' Case

[51] The plaintiffs in Appeal 1092 appealed against the whole of the decision in Suit 629.

[52] In the memorandum of appeal in appeal 1092, the plaintiffs pleaded that the learned JC had erred in fact and law, *inter alia*, for the following reasons:

(i) failed to take into account that the plaintiffs' action in Suit 629 is based of cls. 4 and 5 of the stakeholder agreement;

(ii) failed to take into account the plaintiffs' position that their position and rights as the legal heirs of the deceased was accepted and recognised by Malaysia Airlines as the payor of the settlement sum of RM800,000 as expressly stated in the release agreement;

(iii) failed to take into account the plaintiffs' action in Suit 629 is a claim for declaratory rights under s. 41 of the Specific Relief Act 1950 and not a claim for dependency;

(iv) for finding that the plaintiffs were estopped from making any claims because they are barred by limitation under ss. 7 and 8 of the CLA 1956 and the Montreal Convention;

(v) for finding that the letter dated 17 August 2015 from Mustafa's former solicitors was an action by the plaintiffs to relinquish its rights to file a legal suit against Malaysia Airlines;

(vi) failed to take into account PW1 and PW2's testimony that the deceased's family decided not to file a legal suit against Malaysia Airlines because at the material time, there were discussions taking place between the deceased's family and Malaysia Airlines;

(vii) failed to take into account that the settlement sum released by Malaysia Airlines to the plaintiffs and the defendant was a "goodwill discretionary payment" made in accordance with cls. 1.1 and 1.2 of the release agreement;

(viii) for finding that the party that should be sued in Suit 629 was Malaysia Airlines and not the defendant;

(ix) failed to take into account the two payors of the settlement sum were Khazanah and Malaysia Airlines;

(x) for finding that Suit 629 was filed by the plaintiffs as a "back-door' attempt to "reap the fruits" of the out-of-court settlement between Malaysia Airlines and the defendant in Suit 435;

(xi) failed to take into account that no judgment was recorded between Malaysia Airlines and the defendant in Suit 435;

(xii) failed to take into account that Suit 435 was withdrawn with no liberty to file afresh through a notice of discontinuance dated 26 May 2019 before the settlement payment was released to the parties;

(xiii) failed to take account the plaintiffs' submissions that following the withdrawal of Suit 435 with no liberty to file afresh, it is not appropriate to consider that the settlement payment from Malaysia Airlines was the "fruit of litigation" filed by defendant in Suit 435; instead the settlement payment should be paid to the plaintiffs and the defendant pursuant to the release agreement;

(xiv) finding that the plaintiffs, in particular the child who is the biological son of the deceased, are not entitled to the balance of the settlement sum of RM600,000; and

(xv) failed to take into account the plaintiffs' submission that the balance of settlement payment of RM600,000 should be distributed among the plaintiffs and the defendant in accordance with the faraid order and that the amount of RM200,000 released to the defendant is 3/12 of the RM800,000 paid by Malaysia Airlines.

The Defendant's Case

[53] The defendant's case is that he alone is entitled to whole of the balance of the goodwill payment of RM600,000 and not the child and Mustafa, who are the other legal heirs of the deceased and who are the other releasors in the release agreement.

[54] Learned counsel for the defendant submits that (i) the faraid order for which the plaintiffs had prayed for as the basis for the distribution among the defendant and the plaintiffs is not applicable in the civil court; (ii) the statement of claim in Suit 629 does not disclose any cause of action against the defendant; (iii) the plaintiffs are not entitled to the settlement payment since they had relinquished their rights against Malaysia Airlines and failed to sue the said airlines; (iv) they failed to take any steps to bring a claim against Malaysia Airlines within the limitation period under the Montreal

Convention and the CLA 1956; (v) they did not appeal against the decision of Mohd Firuz Jafril J (as he then was) in dismissing their application to intervene in Suit 435.

[55] Learned counsel for the defendant in their written submissions to this court stated that:

> the mere fact that the plaintiffs are heirs/next of kin does not give the plaintiffs an automatic right to share in the settlement sum received pursuant to civil Suit 435 filed by the defendant solely and after the plaintiffs have relinquished their rights by refusing to join or file a claim following the death of the deceased.

[56] The defendant further contend that the settlement sum paid by Malaysia Airlines does not form part of the assets belonging to the deceased, and as it was not made as compensation to the deceased, it does not belong to the estate of the deceased.

[57] At the High Court, the defendant had raised several procedural issues (listed in para. 42 above), which learned counsel for the defendant submitted rendered the amended writ and statement of claim a nullity. The learned JC ruled that the procedural issues did not render Suit 629 a nullity and proceeded to determine the case based on its merits. Dissatisfied with the learned JC's ruling, the defendant filed Appeal 1122 against the said ruling. The procedural issues, the learned JC's rulings and our findings on the issues are discussed in the section of this judgment relating to Appeal 1122.

Issues

[58] The issues for this court's determination in Appeal 1092 are:

(i) did the plaintiffs relinquish their rights to bring an action against Malaysia Airlines in the letter dated 17 August 2015 from Mustafa's previous solicitors in reply to the defendant's solicitors?

(ii) have the plaintiffs relinquished their rights to the Goodwill Payment made by Malaysia Airlines and Khazanah to the releasors in the release agreement for the deceased's death as a result of the downing of flight MH17 in eastern Ukraine on 17 July 2014? Are they estopped from bringing Suit 629 against the defendant?

(iii) do the civil courts have the jurisdiction to declare the division of the Goodwill Payment made by Malaysia Airlines and Khazanah among the releasors in accordance with distribution portion in the faraid order?

Issue (i): Did The Plaintiffs Relinquish Their Rights To Bring An Action Against Malaysia Airlines In The Reply Letter Dated 17 August 2015 From Mustafa's Previous Solicitors To The Defendant's Solicitors?

[59] Based on the reply letter sent by Mustafa's previous solicitors to the defendant's solicitors, Messrs Brijnandan, the learned JC held that the plaintiffs had refused to join the defendant in his action against Malaysia

Airlines. He went on to hold that for this reason the plaintiffs are estopped from bringing Suit 629 against the defendant for distribution of the balance goodwill payment in sum of RM600,000 received from Malaysia Airlines.

[60] Messrs Brijnandan, in their letter dated 28 July 2015 to Mustafa stated, among others, the following:

> 4. We are retained by and act for Mr. Mohamed Affendi bin Khairuddin.
>
> ...
>
> 3. Our clients have instructed us to seek a compensation settlement and to commence legal proceedings against Malaysian [*sic*] Airlines (MAS) through the Malaysian Courts.
>
> 4. In accordance with the Civil Law Act 1956, we wish to enquire whether you, as the wife/husband/parent/child, are bringing or intending to bring any action against Malaysian [*sic*] Airlines for the MH17 incident in Malaysia.
>
> 5. Should we not receive any written notification from you within fourteen (14) days from the date of this letter, then we shall assume that you are waiving your rights under the Civil Law Act 1956 of Malaysia.
>
> 6. Kindly also advise us if you or your family members have received any compensation settlement or monies from Malaysian [*sic*] Airlines since 17.7.2014.
>
> 7. Please treat this a formal notice.

[61] In their reply letter dated 17 August 2015, Mustafa's previous solicitors informed Messrs Brijnandan the following:

> Adalah dimaklumkan bahawa Pihak keluarga Allahyarhamah tidak berminat untuk campurtangan atau melibatkan diri dalam Tindakan anakguam tuan iaitu Encik Muhammad Affendi bin Khairuddin.
>
> Sehubungan itu, pihak keluarga Allayarhamah tidak bersetuju dengan Tindakan beliau dan tidak mahu terlibat di dalam tindakan beliau tersebut.

[62] From the natural and ordinary meaning of the words in the reply letter dated 17 August 2015, this court finds that Mustafa's previous solicitors informed the defendant's solicitors that (i) the deceased's family is not interested to meddle or be involved in the defendant's action; and (ii) the deceased's family is not interested in defendant's action and do not want to be involved in the defendant's action.

[63] Further, we find that nowhere in the reply letter did Mustafa's previous solicitors state that the deceased's family are not bringing or intending to bring action against Malaysia Airlines for the death of the deceased. Also, nowhere did they state that the deceased's family is waiving their rights under the CLA 1956.

[64] Critically, the right under the s. 7 of the CLA 1956 to maintain an action and recover damages for the death of a person is a statutory right bestowed by Parliament for the benefit of the spouse, parent, child or persons with disabilities under the care of the deceased person.

[65] There is no provision in the CLA 1956 which states that the husband of a deceased person may assume that the parent, child or persons with disabilities under the care of the deceased person have waived their rights under the said Act by their failure to reply to a letter written by the husband's solicitors enquiring whether they are bringing or intending to bring an action against the person whose wrongful act caused the death of the deceased person. If Parliament wanted to allow one of deceased's beneficiary/next of kin to assume the other beneficiaries/next of kin's waiver of their statutory rights by their actions and/or omission, it would have expressly provided so in the CLA 1956.

[66] Moreover, Mustafa's previous solicitor did not state that the deceased's father and child are waiving their rights to maintain an action and recover damages from Malaysia Airlines. All the solicitor stated in the reply letter was that the deceased's family does not want to be involved in any action taken by the defendant.

[67] In addition, any action under s. 7(2) of the CLA 1956 must be brought by and in the name of the executor of the person deceased for the benefit of the spouse, parent, child or persons with disabilities under the care of the deceased person. The defendant was neither the executor nor the administrator of the deceased's estate when he filed Suit 435. He brought the action in his personal capacity for his own benefit and not as the executor of the deceased's estate for the benefit of deceased's spouse, child or parent.

[68] Accordingly, for these reasons, we find that the learned JC was plainly wrong to find that the plaintiffs had relinquished their rights to bring an action against Malaysia Airlines by reason of the reply letter dated 17 August 2015 from Mustafa's previous solicitors to the defendant's solicitors.

Issue (ii): Have The Plaintiffs Relinquished Their Rights To The Goodwill Payment Made By Khazanah And Malaysia Airlines To The Releasors In The Release Agreement For The Deceased's Death As A Result Of The Downing Of Flight MH17 In Eastern Ukraine On 17 July 2014? Are They Estopped From Bringing Suit 629 Against The Defendant?

[69] The plaintiffs did not, in Suit 629, bring an action for tort against the defendant nor did they bring an action under the CLA 1956 against him.

[70] Instead, they had brought an action against the defendant for declarations under s. 41 of the Specific Relief Act 1950 based on (i) the stakeholder agreement; (ii) the release agreement; and (iii) the faraid order.

[71] The plaintiffs did try to intervene in Suit 435 in 2018 but their application to intervene was dismissed by the High Court by an order dated 14 September 2018 by reason of the purported relinquishment of their rights under CLA 1956 and because of limitation had set in.

[72] PW1 and PW2 testified that they had engaged in negotiations with Malaysia Airlines. Malaysia Airlines had also negotiated the settlement of Suit 435 with the defendant. The settlement negotiations between Malaysia Airlines and the plaintiffs and defendant was mediated by Azizul Azmi Adnan J (as he then was).

[73] Resulting from the mediation, the plaintiffs and defendant entered into the stakeholder agreement with Messrs Brijnandan on 28 May 2019. The defendant then filed a notice of discontinuance dated 25 June 2019 and withdrew his action against Malaysian Airlines in Suit 435 with no order as to cost and no liberty to file afresh.

[74] After the defendant had discontinued his action in Suit 435, the plaintiffs and defendant entered into the release agreement with Malaysia Airlines with Malaysia Airlines on 17 June 2019. The chronology of the events as regards the stakeholder agreement, discontinuance of Suit 435 and the release agreement is shown in the table below.

Date	Event
28.05.2019	stakeholder agreement.
25 June 2019	Notice of Discontinuance of Suit 435.
17 June 2019	release agreement

[75] After the first plaintiff, Mustafa and the defendant had signed the release agreement, Malaysia Airlines released the goodwill payment of RM800,000 to Messrs. Brijnandan as stakeholders.

[76] As mentioned above, pursuant to the stakeholder agreement, RM200,000 of the RM800,000 was released forthwith to the defendant. The RM600,000 was kept by Messrs Brijnandan as stakeholder pending the plaintiffs filing an action against the defendant within three months from the date of the release agreement. If the plaintiffs did not file within the said period of three months from the release agreement, under cl. 5(b) of the stakeholder agreement, Messrs Brijnandan was to release the RM600,000 to the defendant.

[77] We find that the plaintiffs had not relinquished their rights to the goodwill payment made by Khazanah and Malaysia Airlines to the releasors in the release agreement for the deceased's death for the following reasons:

(i) the plaintiffs did not relinquish their rights under the CLA 1956 through the reply letter from Mustafa's previous solicitors to Messrs Brijnandan for the reasons we discussed in issue (i) above;

(ii) based on the terms of the stakeholder agreement, the plaintiffs would have relinquished their rights to the RM600,000 if they did not file an action against the defendant within three months from the date of the release agreement. The fact that the plaintiffs had filed Suit 629 against the defendant within three months from the date of the release agreement, means that the plaintiffs did not relinquish their rights to the goodwill payment;

(iii) under the release agreement, Khazanah and Malaysia Airlines made the goodwill payment to the releasors who are the defendant, Mustafa and the first plaintiff as guardian *ad litem*/litigation representative of the child. They did not make the payment to the defendant alone;

(iv) the releasors *ie*, the defendant, Mustafa and the first plaintiff (acting as the guardian/litigation representative of the child) had expressly acknowledged in para. 1 of the release agreement that they had received the goodwill payment from Khazanah and Malaysia Airlines in full and final settlement of their claim as a result of the deceased's death; and

(v) the releasors had warranted in cl. 6 of the release agreement that the releasors:

(a) are entitled to claim for the death of the deceased;

(b) they shall distribute the goodwill payment to the rightful legal heirs, beneficiaries and/or dependents of the deceased who are entitled to claim for the death of the deceased; and

(c) they have not abandoned, transferred, made over assigned or otherwise disposed of their right to the estate or entitlement to claim for the death of the deceased to any person or entity.

[78] The defendant, Mustafa and the child are the rightful legal heirs, beneficiaries and/or dependents of the deceased who are entitled to claim for the death of the deceased.

[79] The releasors had warranted under the release agreement they have not, *inter alia*, abandoned, transferred or otherwise disposed of their right to claim for the death of the deceased.

[80] Hence, it is not open for the defendant to argue that the first plaintiff who is acting as the guardian *ad litem*/litigation representative of the child and the second plaintiff who is acting as the litigation representative of Mustafa, had relinquished their rights to claim for the death of the deceased.

[81] Additionally, having contractually warranted under the release agreement that he, Mustafa and the first plaintiff (acting as the guardian/litigation representative of the child) are entitled to claim for the goodwill payment, it is not open for the defendant to claim that the plaintiffs are not entitled to the claim part of the goodwill payment paid by Khazanah and Malaysia Airlines for the death of the deceased.

[82] Furthermore, the defendant as one of the releasors had warranted under the release agreement that he will distribute the goodwill payment to the rightful legal heirs, beneficiaries and/or dependents of the deceased who are entitled to claim for the death of the deceased. Therefore, if the defendant fails and/or refuses to distribute Mustafa's and the child's share of the goodwill payment to them, the defendant will be in breach of the release agreement.

[83] For these reasons, we find that the plaintiffs are not estopped from bringing Suit 629 against the defendant.

[84] It is our considered view that the learned JC was plainly wrong to have concluded that the plaintiffs had "entered the suit through the back door" and had "reaped the fruits" of the defendant's successful negotiations with Malaysia Airlines in Suit 435. In arriving at such conclusion, the learned JC failed to take into account PW1 and PW2's testimony that they had negotiated with Malaysia Airlines for the deceased's legal heirs' claim for the deceased death. Also, he did not consider that Azizul Adnan J (as he then was) had mediated both the plaintiffs' as well as the defendant's claim against Malaysia Airlines, and not the defendant's claim alone.

[85] Furthermore, the learned JC failed to acknowledge that (i) no consent judgment was entered in Suit 435 in settlement of the defendant's claim against Malaysia Airlines; (ii) the defendant had withdrawn Suit 435 with no liberty to file afresh; (iii) Malaysia Airlines had entered into the release agreement with the first plaintiff, the defendant and Mustafa – it did not enter into the release agreement with the defendant alone; (iv) Malaysia Airlines released the goodwill payment to the stakeholders only after the first plaintiff, Mustafa and the defendant signed the release agreement.

[86] The learned JC did not appreciate that the plaintiffs' action against the defendant in Suit 629 was neither a dependency claim nor a claim on the estate of the deceased. The plaintiffs' action in Suit 629 was a contractual claim under the terms of the stakeholder agreement and the release agreement for the balance of the goodwill payment by Khazanah and Malaysia Airlines paid to the releasors under the release agreement.

[87] Accordingly, we find that the learned JC was plainly wrong to hold that the plaintiffs were estopped from bringing Suit 629 against the defendant for, *inter alia*, declaratory orders that the child and Mustafa are entitled to the goodwill payment paid by Khazanah and Malaysia Airlines to the releasors.

Issue (iii): Do The Civil Courts Have The Jurisdiction To Declare The Division Of The Goodwill Payment Made By Malaysia Airlines And Khazanah Among The Releasors In Accordance With The Faraid Order?

[88] The plaintiffs had sought a declaration in Suit 629 that the balance of the goodwill payment of RM600,000 held in the stakeholder account by Messrs Brijnandan, together with any profit obtained from the Islamic fixed deposit be distributed in accordance with the faraid order.

[89] The learned JC held that the High Court has the necessary jurisdiction to determine the plaintiffs' entitlement under the faraid order since the plaintiffs are merely seeking for a distribution of the goodwill payment in accordance with the distribution portion ordered under the faraid order. As they are not asking for the issuance of a faraid order by the High Court, the learned JC held that List II - State List of the Ninth Schedule of the Federal Constitution does not apply as regards the plaintiffs' claim in Suit 629. He held that the case of *Latifah Mat Zin v. Rosmawati Sharibun & Anor* [2007] 5 CLJ 253; [2007] 5 MLJ 101 is distinguishable because it involved *inter vivos* or hibah gifts between Muslims. In that case, the Federal Court held that the determination of whether the monies had been given by the deceased to the appellant is a matter within the jurisdiction of the Syariah Court.

[90] We agree with the learned JC's findings. The plaintiffs in Suit 629 were merely seeking for the High Court to distribute monies among the deceased's legal heirs in accordance with the distribution portion in the faraid order that was granted by the Negeri Sembilan Syariah High Court pursuant to s. 65 of the Enakmen Pentadbiran Agama Islam (Negeri Sembilan) 2003. They were not seeking in Suit 629 for the High Court to determine the distribution portion of the goodwill payment among the deceased's legal heirs. Nor were they seeking for the High Court to issue a faraid order.

[91] Accordingly, we find that the civil courts do have the jurisdiction to declare the division of the goodwill payment made by Malaysia Airlines and Khazanah among the releasors in accordance with the faraid order dated 25 February 2015 issued by the Negeri Sembilan Syariah High Court.

Conclusion

[92] Based on the above reasons and analysis, we find that the learned JC was plainly wrong in dismissing the plaintiffs claim in Suit 629.

[93] We find that the High Court's decision in Suit 629 should be set aside and that the reliefs sought by the plaintiff's in para. 23 of its amended statement of claim be allowed with costs.

Appeal 1122

[94] The defendant's appeal in Appeal 1122 is against the learned JC's dismissal of the procedural issues raised by the defendant in Suit 629 and the cost of RM10,000 awarded to him.

[95] The procedural issues raised by the defendant in Suit 629 are:

(i) Whether the amended writ is a nullity in light of the Federal Court case of *Sng Hung Meng v. Public Utilities Board* [1966] 1 MLRA 443 as the plaintiff has failed to comply with mandatory requirement for the writ to be issued in the name of the Yang di-Pertuan Agong?

(ii) Whether the amended writ and statement of claim can be amended in light of the case of *Petra Perdana Berhad v. Tengku Dato' Ibrahim Petra bin Tengku Indra Petra & Ors* [2017] MLJU 410 which states that the amended writ cannot be assisted by the saving provisions such Order 1A of the Rules of Court 2012 and therefore the writ and statement of claim are a nullity?

(iii) Whether the citation of the tutelage on the amended writ and statement of claim is bad in law as both the first and second plaintiffs lack of capacity to bring this suit as the first and second plaintiffs failed to obtain letter of administration to the estate of Mastura binti Mustafa?

(iv) Whether the second plaintiff, Thaib bin Mustafa can proceed with the suit without obtaining letters of administration to administer the estate of Mustafa bin Ab Samad who brought an action against the defendant when he was alive. As such the failure to obtain the letters of administration before amending the tutelage makes it lack of capacity, therefore is bad in law?

(v) Whether it is mandatory to comply with Order 76 rule 2 and Order 76 rule 3(7) of the Rules of Court 2012 whereby the first plaintiff need to file the Forms 188 and 189 to state whether there is no adverse interest against the minor?

[96] Order 6 r. 1 of the ROC states that every writ shall be in Form 2 for the High Court, whereby the writ is issued by the Chief Judge of Malaya in the name of the Yang di-Pertuan Agong. The amended writ of summons in Suit 629 was missing the words "Chief Judge of Malaya in the name of the Yang di-Pertuan Agong".

[97] The defendant's counsel argued that in light of the Federal Court case of *Sng Hung Meng v. Public Utilities Board* [1966] CLJU 182; [1966] 1 LNS 182; [1966] 2 MLJ 25; [1965-1966] SLR 107, the plaintiff's failure to issue the amended writ in the name of the Yang di-Pertuan Agong rendered the writ and statement of claim a nullity, which cannot be cured by O. 1A of the ROC.

[98] For the reasons detailed in his grounds of judgment, the learned JC dismissed the procedural issues raised by the defendant as regards the amended writ and statement of claim and held that these issues are curable under O. 1A of the ROC and accordingly does not nullify the plaintiffs' action in Suit 629.

[99] *Sng Hung Meng v. Public Utilities Board* is a decision of the Singapore Federal Court relating to a writ issued by the plaintiff on 17 November 1965 just after Singapore became an independent state on 9 August 1965. The mandatory part of the writ was in the form "The Honourable Dato' Wee Chong Jin, PMN, Chief Justice of Singapore in the name and on behalf of His Majesty the Yang di-Pertuan Agong". The defendant applied for the writ to be set aside on the ground of irregularity and on the ground, *inter alia*, that the writ was issued in the name of the Yang di-Pertuan Agong and not in the name of the Yang di-Pertuan Negara, the Head of State in Singapore.

[100] The Singapore High Court held that the writ should have been issued in the name of the Yang di-Pertuan Negara, the Head of State in Singapore, and as the writ was issued in the name of the Yang di-Pertuan Agong, a sovereign of a foreign country, the writ was null and void. The Singapore Federal Court affirmed the High Court's decision. It held that the issue of a writ in the name of a foreign sovereign commanding the appearance of a person before the High Court of Singapore is a bad writ and was a nullity.

[101] In this case, the plaintiffs did not issue the amended writ in Suit 629 in the name of the sovereign of a foreign country. Accordingly, we agree with the learned JC that the amended writ in Suit 629 is not a nullity in light of the Singapore Federal Court decision in *Sng Hung Meng v. Public Utilities Board*.

[102] Moreover, under O. 2 r. 3 of the ROC, courts and judges may only allow preliminary objections for non-compliance of the rules if the court or the judge is of the view that the non-compliance has occasioned a substantial miscarriage of justice or prejudice that cannot be cured by amendment or order for costs or both. Order 2 r. 3 of the ROC states:

> Preliminary objection for non-compliance of rules not allowed
>
> A Court or Judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any provision of these Rules unless the Court or Judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice or occasioned prejudice that cannot be cured either by amendment or an appropriate order for costs or both.

[103] The defendant did not claim that the plaintiffs' failure to issue the amended writ in the name of the Yang di-Pertuan Agong had caused him a substantial miscarriage of justice or prejudice that cannot be cured by amendment or an appropriate order for costs. And this court is of the opinion that the plaintiffs non-compliance with O. 6 r. 1 of the ROC as regards the format of a writ had not occasioned a substantial miscarriage of justice or prejudice to the defendant in Suit 629 that cannot be cured either by amendment or an appropriate order for costs or both.

[104] For these reasons, we find that the learned JC did not fall into error in holding the non-compliance of the writ with the rules did not render the amended writ and statement of claim a nullity.

[105] As for the second procedural issue raised by the defendant in Suit 629, with respect to learned counsel for the defendant, the procedural issue raised in *Petra Perdana Bhd v. Tengku Dato' Ibrahim Petra Tengku Indra Petra & Ors* [2017] CLJU 422; [2017] 1 LNS 422; [2017] MLJU 410 was not in relation to the non-conformity to the rules of a writ or statement of claim. It was in relation to the period for which an application for assessment of damages is to be filed under O. 37 r. 1 of the ROC. The High Court in that case held that the requirement of one month period to file the application for assessment of damages from the date of judgment is not mandatory and non-compliance is not fatal.

[106] With regards to the defendant's challenge based on the plaintiffs' lack of letters of administration of the deceased's estate, we agree with the learned JC that the stakeholder agreement had expressly granted the first plaintiff and the original second plaintiff (Mustafa) the right to initiate Suit 629 for the determination of the parties' rights to the RM600,000 held by Messrs Brijnandan in the stakeholder accounts. The learned JC did not fall into error in his finding that as the defendant had contractually agreed under the stakeholder agreement for the plaintiffs to bring Suit 629 against him, such agreement negates the defendant's argument that the plaintiffs cannot bring the said suit without first obtaining letters of administration of the deceased's estate.

[107] Furthermore, the plaintiffs had brought Suit 629 against the defendant pursuant to the terms of the stakeholder agreement and the release agreement.

[108] As for the procedural issue relating to Thaib's right to act as second plaintiff representing the estate of Mustafa, without first obtaining letters of administration to administer Mustafa's estate, the learned JC held that Thaib has the right to act as litigation representative of Mustafa's estate in Suit 629 by reason of the High Court order dated 24 November 2020 pursuant to O. 15 r. 7 of the ROC granting Thaib the right to continue with Suit 629 as if he had been substituted for Mustafa in the said Suit 629, which remains in force.

[109] We agree with the learned JC's finding that Thaib has the right to act as litigation representative of Mustafa's estate pursuant to the High Court order dated 24 November 2020.

[110] On the issue of whether it is mandatory for the first plaintiff to file Forms 188 and 189 under O. 76 r. 2 and O. 76 r. 3(7) of the ROC, we agree with the learned JC's finding that the filing of the said forms is only necessary if the first plaintiff had not been appointed by the court as the child's litigation representative. In this case, the first plaintiff was granted leave by the Ipoh High Court to act as the child's litigation representative pursuant to an order dated 15 May 2019.

[111] As regards, the defendant's appeal on the costs awarded to him on conclusion of trial of Suit 629, O. 59 r. 19 of the ROC states that the amount of costs payable for trial in the High Court shall be at the discretion of the court. For this reason, the defendant does not have the right to appeal against amount of costs awarded by the High Court. It is noted that the decision of the learned JC in Suit 629 was cited by the editors of the *Malaysian Civil Procedure 2024* at p. 925 as an illustration of the court's exercise of its discretion in the award of costs at the conclusion of trial. The entry is reproduced below:

> The court may not impose a high award of costs of it involves a tragedy, particularly involving children (*Marzaidi Mohammad & Anor v. Mohamed Affendi Khairuddin* [2024] 1 MLRH 392; [2024] 7 MLJ 701; [2023] 10 CLJ 305 at [86], HC).

Conclusion

[112] Accordingly, for the above reasons, we find no error in the learned JC's analysis and reasonings for dismissing the procedural issues raised by the defendant.

[113] As regards the costs awarded to the defendant in Suit 629, the learned JC is free to determine the amount of costs at the end of trial. It is not for this court to interfere with the exercise of his discretion.

Decision

[114] Accordingly, for the findings and reasons above, we allow the plaintiffs' appeal in Appeal 1092 and dismiss the defendant's appeal in Appeal 1122.

[115] The High Court's decision in Suit 629 dated 26 June 2023 is hereby set aside and the declarations sought by the plaintiffs in para. 23(a), (b) and (c) of the amended statement of claim are hereby granted.

[116] Messrs Brinjnandan Singh Bhar & Co is hereby ordered to release to the first and second plaintiffs and the defendant, in accordance with the distribution portion in the faraid order, the sum of RM600,000 in the stakeholders account together with the profit from the Islamic fixed deposit account no. 264089546970 in Maybank Islamic Berhad as per para. 22 of the amended statement of claim within 14 days from the date of this order.

[117] Costs of RM10,000 for Appeal 1092 is to be paid to both plaintiffs by the defendant, and costs of RM10,000 for Appeal 1122 to be paid to both plaintiffs by the defendant, subject to allocatur.